UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF

MEMORANDUM

SUBJECT: NL Industries, Inc. (Taracorp) CERCLA Site: Ace Scrap Metal Processors, Inc. Cost Recovery Consent Decree 10-Point Settlement Analysis

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TO: Richard C. Karl, Director
Superfund Division, Region 5

I. PURPOSE

The purpose of this Memorandum is to recommend that you sign the attached Consent Decree between the United States, on behalf of U.S. EPA, and Ace Scrap Metal Processors, Inc (Ace). The Consent Decree requires Ace to pay to the U.S. EPA Hazardous Substance Superfund $580,000 plus interest in reimbursement of past response costs and a civil penalty of $20,000 for failure to comply with a Unilateral Administrative Order. The Consent Decree is based on the model Consent Decree and contains the standard Covenant Not to Sue and Contribution Protection language.

II. EXECUTIVE SUMMARY

From 1928 to 1983, a secondary lead smelter and battery recycling facility was operated at a plant located in Granite City, Illinois. NL owned and operated this facility from 1928 until August of 1979. As a result of industrial activities conducted by NL at the plant, including battery recycling and lead smelting operations, large amounts of waste containing lead and other hazardous substances were disposed of at the plant. This lead waste contaminated not only the plant, but also the soil of residences located nearby within a 60 block area in three cities at approximately 1500 residences. In August 1979, NL sold the plant to Taracorp Industries, Inc. Ace sent used lead batteries and other forms of scrap lead to the plant pursuant to arrangements with NL and later with Taracorp.

A RD/RA/Cost Recovery Consent Decree with six generators was previously entered in 2004 in district court, and a Cost Recovery Consent Decree with owner/operator NL Industries, Inc. was also entered in 2004. These two Consent Decrees resulted in the successful and nearly complete performance of RD/RA, the recovery of over 97% of EPA's past costs of approximately

$43,000,000, payment of $1.4 million in penalties for failure to comply with a CERCLA Section 106 Unilateral Order for RD/RA, and a $2,000,000 SEP. Ace is a generator who was not a party to either of the previous Consent Decrees. DOJ has made a determination that Ace is financially unable to pay more than the settlement amounts contained in this Consent Decree.

III. BACKGROUND

A. Site History

From 1928 to 1983, a secondary lead smelter and battery recycling facility was operated at a plant located in Granite City, Illinois. NL Industries, Inc. owned and operated this facility from 1928 until August of 1979. As a result of industrial activities conducted by NL at the plant, including battery recycling and lead smelting operations, large amounts of waste containing lead and other hazardous substances were disposed of at the plant. This lead waste contaminated not only the plant, but also the soil of residences located nearby. In August of 1979, NL sold the plant to Taracorp Industries, Inc. Smelting operations at the facility ended in 1983.

The Site includes the plant as well as lead-contaminated adjacent property within Granite City, Madison, and Venice, Illinois. As a result of smelting activities and battery recycling operations at the Site, large volumes of lead and other hazardous substances, including antimony, arsenic, barium, cadmium, chromium, lead, mercury, nickel and zinc, were deposited at the Site. Portions of the waste piles came to rest at various places in the communities surrounding the piles as members of the public were permitted by NL to remove portions of the piles for use as fill material and smelting operations resulted in the emission of lead and other hazardous substances to the air and into the surrounding community at the Site.

In June of 1986, EPA placed the Site on the National Priority List ("NPL"). NL performed a Remedial Investigation and Feasibility Study ("RI/FS") between 1985 and 1990 pursuant to a 1985 Administrative Order on Consent. Based on the information developed by that RI/FS, EPA issued a Record of Decision ("ROD") that stated that the remedy for the Site would include excavation of lead contaminated soil exceeding 500 parts per million ("p.m.") in residential areas; excavation of all unpaved, non-residential areas where lead concentrations exceeded 1000 p.m.; concentration of various separate waste piles into one pile to be located at the plant; and capping of the waste pile.

On November 27, 1990, EPA issued a UAO to 49 potential responsible parties to carry out the remedy outlined above. None of the defendants complied with this order. NL, and the generator defendants later named in this case, offered to perform part of the UAO, but refused to excavate soil located in residential areas that contained between 500 ppm and 1,000 ppm lead, arguing that

the latter figure should be the cutoff point. Since the yards of about 1000 residences had lead contamination between 500 and 1,000 ppm, and only 350 had contamination at levels over 1,000 ppm, that meant that EPA would have to carry out the bulk of the remedy for the residences. EPA did not want to split the remedy, and began to implement a Fund-financed remedy. The failure of the defendants to comply with the UAO delayed execution of the remedy. The PRPs later made an offer to accept the 500 cleanup level, if they could average levels across a block itself, instead of going yard by yard. EPA rejected this approach for numerous reasons. The PRPs later came back to the agency and agreed to conduct the remedy contained in the ROD and DD/ESD.

B. Litigation History

In August 1991, we filed suit against NL and nine generators. With this final settlement with Ace, the suit has been fully resolved against all defendants. Our complaint sought both cost recovery under Section 107(a) and civil penalties and punitive damages for the failure of the defendants to carry out the UAO. Although we asked that the Court order the defendants to comply with the UAO, we did not seek a preliminary injunction to force the defendants to perform the remedy. An administrative *de minimis* settlement has been finalized and the proceeds distributed to the performing parties in the RD/RA Consent Decree. A contribution action between generators who settled (either by Consent Decree or *de minimis* settlement) is ongoing but does not directly affect the government.

C. Settlement Discussions

The failure of the City's effort to enjoin EPA's remedy caused the defendants to initiate settlement discussions. Since the generator defendants and NL were unwilling to reach an internal settlement that would permit them to deal with us jointly, we have dealt with them individually.

The first offer came from NL. It offered to pay $20 million to cash out its liability. The basis for this offer was NL's estimate that the total costs at the Site would be $60 million, and that as an owner-operator, its share of the liability should be 50%. It asserted that its share should be further reduced because other owner-operators (e.g., Taracorp) were responsible for some part of the contamination. NL's offer did not include any payment for civil penalties for its failure to comply with the UAO. NL refused to perform a supplemental environmental project ("SEP") to address lead paint because it is owned by a company that has made lead paint in the past.

In their initial proposal, the generator defendants offered to do the remaining work at the Site, including remediation of residential soil containing greater than 500 ppm lead, something they

refused to do in the past. They did not offer to pay any response costs nor to make any payments towards a civil penalty. We pushed for a settlement with the generators that would result in their paying almost all of EPA's past costs and to take over certain components of the remedy, not including the residential yard remediation because it was felt to transfer this work from EPA's contractor to the generators would only further delay the remedy. We also asked the generator defendants to carry out a lead paint remediation SEP for residences in the area.

The most difficult issue was determining the amount which should be paid in settlement of the civil penalty/punitive damages claim. We determined that application of EPA's draft civil penalty policy would result in a very large penalty that defendants would be unwilling to pay and that the Court would be unlikely to award. Consequently, rather than relying on the draft penalty policy, we calculated a penalty that was in line with what we have obtained in other cases. Based on these factors, we sought to obtain between $300,000 and $500,000 from the generator defendants collectively, and to have them perform a lead paint remediation SEP worth $2-3 million. We also determined that a $1 million penalty would be sought from NL. Combined, this approach results in a civil penalty of $1.4 million and a SEP worth at least $2 million.

EPA suggested that it would be amenable to a settlement in which, in addition to paying a penalty for failure to comply with its administrative order, the defendant generators as a group representing all generators and NL, individually, would share responsibility for all past response costs and future remediation costs on a roughly equivalent basis. To that end, EPA used its cost estimate for future remedial costs as the basis upon which to credit the future work towards the settlement amount of whoever performed it.

Eventually, EPA elected to permit the generator defendants to complete the remedial action because, in part, NL was unwilling to perform a SEP designed to abate lead in residences near the Site and the generator defendants were. The generator defendants' settlement therefore is a combination of the EPA estimate of the costs of future remediation plus a share of past costs. The NL settlement addresses the balance of all remaining unreimbursed response costs. In July 1998, the generator defendants, in order to maximize any savings attributable to performing the remedy, took over performance of the remedy with approval of EPA Region 5. They have been performing all remediation at the Site since that time.

IV. SETTLEMENT TERMS

The Consent Decree requires Ace to pay to the U.S. EPA Hazardous Substance Superfund $580,000.00 in reimbursement of past response costs and a civil penalty of $20,000.00 for failure to comply with the Unilateral Administrative Order. The Consent Decree is based on the model Consent Decree and contains the standard Covenant Not to Sue and Contribution Protection

language

V. ANALYSIS OF SETTLEMENT CRITERIA

Considering all of the factors set forth in the CERCLA Settlement Policy, it is in the Government's interest to enter into this Consent Decree.

1. Volume of Waste Contributed to Site

Documentation of waste shipments to the Site is limited to the period covering 1970 -1983 and was provided to EPA by NL Industries, Inc. The total poundage of wastes contributed to the Site during that period of time was 235,034 tons. Ace shipped 9,211 tons of waste to the Site which represents 3.919% of all wastes shipped to the site between 1970 and 1983. All wastes received at the Site were batteries or other lead-bearing scrap materials. These materials also contained other metals such as antimony, arsenic, barium, cadmium, chromium, mercury, nickel and zinc. The only limitation of this documentation is that none exists prior to 1970.

2. Nature of Waste

The waste was derived from scrap containing lead which consists of old batteries, battery plates, wire, and various other scrap metal which were then processed in the secondary lead smelter. The primary contaminants derived from this process were lead, and other metals. Acid contained in lead batteries may have also changed the chemistry of the lead, and made it more mobile as evidenced by groundwater contamination.

3. Strength of Evidence Linking Ace to the Site

The evidence linking Ace to the Site is very strong. Comprehensive documentation of transactions between all generators from 1970- 1983 was provided to EPA by NL Industries. The only limitation of this documentation is that none exists prior to 1970.

4. Ability to Pay

DOJ's Antitrust Division determined that Ace could pay $500,000.00 excluding Ace's insurance coverage from Travelers Insurance Co. Travelers is making up the difference for a total settlement of $600,000.00. Payment is spaced over a four-year period.

Ace has three policies with Travelers, each capped at 500k. There is a substantial litigation risk as to the policies. Two are for post-1983, after operations ceased at the Site. More problematic

is language that appears in an exclusion provision in all three policies. This provision states that coverage does not apply to contamination arising out of the "named insured's products," which are defined as "goods or products manufactured, sold, handled or distributed by the "named insured," or Ace. We would therefore have to argue that the scrap batteries or battery plates that Ace sent to the Site and received payment for were not "goods OR products" that Ace "sold, handled OR distributed."

Ace gets contribution protection and a covenant for the Site with standard reservations. Per the ability to pay model CD, there is no reopener. Note that the covenant and contribution protection are conditioned on the veracity and completeness of the financial information upon which the financial analysis was based.

5. Litigative Risks Proceeding to Trial

a. Admissibility of U.S. EPA's Evidence.

No apparent problem.

b. Adequacy of U.S. EPA's Evidence.

Although establishing the liability of Ace as a generator under Section 107(a)(3) of CERCLA would be straight-forward, and Ace was a substantial contributor of waste to the Site,[1] Ace has substantiated an inability to pay claim. After reviewing the company's financial information, the Antitrust Division of DOJ determined that Ace can pay $500,000, exclusive of the company's insurance coverage. Ace's insurance carrier, Travelers, is contributing $100,000 toward the $600,000 settlement amount. While Ace has three policies with Travelers, each capped at $500,000, there is substantial litigation risk as to these policies. Specifically, an exclusion provision contained in all three policies states that coverage does not apply to contamination arising out of the "Named Insured's Products," which are defined as "goods or products manufactured, sold, handled or distributed by the "Named Insured" (Ace). One would therefore have to argue that the scrap batteries or battery plates that Ace sold to the Site were not

[1]Ace was the fourth largest contributor of waste to the NL Site. Ace sold primarily scrap batteries and battery plates to the Site, and we have voluminous documentation of these transactions. Moreover, the Superfund Recycling Equity Act ("SREA") would not apply to Ace because it was a party in this "pending judicial action initiated by the United States" before the provision was enacted. 42 U.S.C. § 9627(I). Presiding Judge Foreman has previously ruled SREA inapplicable to similarly situated defendants in this matter.

"goods or products" that Ace "sold, handled or distributed." As discussed below, Travelers has a very strong argument that the exclusion applies in this case.

1. The materials sent to the Site by Ace were "sold, handled or distributed."

Ace, a for-profit business engaged in the processing and sale of scrap metal, sold its battery plates and scrap batteries to NL and Taracorp in the ordinary course of its business. There is documentation that Ace received payment from NL and Taracorp for the battery plates and scrap batteries.

2. The materials sold to the NL and Taracorp by Ace were probably "goods or products."

It would be difficult to argue that Ace's battery plates and scrap batteries were not "goods or products" within the meaning of the exclusion. While courts have considered whether real property or labor services are "goods" or "products" under this type of exclusion,[2] the status of Ace's materials appears beyond debate. *See, e.g.*, Black's Law Dictionary (8th ed. 2004).[3]

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[2]*E.g. Underwriters at Interest v. SCI Steelcon*, 905 F. Supp. 441 (W.D. Mich. 1995) (construction of building was not a "good or product" because contractor provided labor only"); *Green Construction Company v. National Union Fire Insurance Company*, 771 F. Supp. 1000, 1004 (W.D. Mo. 1991) (dam built by insured was not a "product").

[3]Blacks Law Dictionary defines "goods" and "product" as follows:

goods. 1. Tangible or movable personal property other than money; esp., articles of trade or items of merchandise. The sale of goods is governed by Article 2 of the UCC. 2. Things that have value, whether tangible or not. "'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. 'Goods' also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107)." UCC § 2- 105(1).

product. Something that is distributed commercially for use or consumption and that is usu. (1) tangible personal property, (2) the result of fabrication or processing, and (3) an item that has passed through a chain of commercial distribution before ultimate use or consumption.

In sum, Travelers has a very strong argument that the exclusion contained in all three of Ace's policies precludes any insurance recovery.[4] Under these circumstances, we believe that the insurer's $100,000 contribution to the settlement is acceptable.

c. Availability of Defenses.

See preceding section.

6. Public Interest Consideration

The nature of this Site and the remedy has promoted a high level of public interest in this Site. However, most if not all of the public's interest focused on the remedial aspects and lead abatement which are addressed to the public's satisfaction by the generator Decree. There has been very little interest in government cost recovery matters.

7. Precedential Value

This settlement has little precedential value

8. Value of Obtaining a Present Sum Certain

There is a high value placed on obtaining a present sum certain under the present circumstances of the Fund, especially when that sum, together with the other Decree, represents such a high percentage of total government costs.

9. Inequities and Aggravating Factors

None.

10. Nature of the Case That Remains After Settlement

But for future implementation of institutional controls by the generator settlors as set forth in the

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[4]Travelers also has an argument that the policies would be governed by the law of Missouri and that coverage would be limited to injuries that occurred during, or as a result of exposures that occurred during, the limited period Ace's policies were in effect. Even assuming we could obtain evidence documenting injuries or exposures in 1983, 1984, and 1985, such an approach would significantly limit the scope of claims covered by the policies.

RD/RA Consent Decree, this should complete this case.

VI. Recommendation

For the reasons set forth above, and based on an evaluation of the terms of the proposed Consent Decree, it is our recommendation that the U.S. EPA enter into the Consent Decree. I believe its outcome represents the best interest of Superfund under all of the present circumstances.